Bank Pembangunan dan Infrastruktur Malaysia Bhd (formerly known as Bank Pembangunan Malaysia Bhd) v Omar bin Hj Ahmad

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO B-02–181 OF 2002
LOW HOP BING, KANG HWEE GEE AND AZHAR MA'AH JJCA
18 MARCH 2010

Bankruptcy — Capacity of bankrupt — Whether bankrupt had capacity to charge land as security for loan — Bankrupt executing third party charge over Malay reserve land — Land charged not registered in name of official assignee — Whether Malay reserve land could vest in official assignee on proprietor's bankruptcy — National Land Code s 349(3) — Malay Reservations Enactment (FMS Cap 142) s 12

Land Law — Charge — Equitable charge — Chargor agreeing to execute charge over Malay reserve land as security for loan to third party — Chargor readily executing charge — Charge over land attested by advocate and solicitor instead of by land administrator — Whether equitable charge created — Whether wrong attestation by advocate and solicitor would invalidate charge — National Land Code s 211, Fifth Schedule para 3(1)

Land Law — Malay reservations — Charge — Attestation of — Charge over Malay reserve land attested by advocate and solicitor instead of by land administrator — Whether charge registrable as legal charge under the National Land Code — National Land Code s 211, Fifth Schedule para 3(1)

The appellant bank ('the bank') entered into a loan agreement with the borrower on 2 April 1992. The loan was to have been secured, inter alia, by a third party charge over certain Malay reserve land ('the land') owned by the defendant. The charge was executed by the defendant, as chargor, and attested by an advocate and solicitor instead of by the land administrator. Subsequent to the execution and attestation, the bank disbursed the loan to the borrower. However, the bank had no knowledge that the defendant had in fact been adjudicated a bankrupt on 20 February 1991. The defendant thereafter lodged a caveat on the land on 5 March 1993. The third party charge on the land could not be registered at the land office because the charge was attested by an advocate and solicitor. The bank thus applied to the High Court for orders, inter alia, declaring the existence of an equitable charge over the land and directing the defendant to withdraw the caveat and to execute a valid registrable

A third party charge over the land before the land administrator. The High Court however dismissed the bank's application and the bank thus appealed to the Court of Appeal. The issue for the Court of Appeal's determination was whether a third party charge over Malay reserve land attested by an advocate and solicitor instead of by the land administrator, could create a third party B equitable charge over the same land for subsequent registration as a third party legal charge, upon due and proper attestation by the land administrator.

Held, allowing the appeal with no order as to costs:

C (1) The charge executed by the defendant as chargor and attested by an advocate and solicitor instead of by the land administrator was clearly not in accordance with s 211 read with para 3(1) of the Fifth Schedule to the National Land Code ('Code'). Thus, it was not registrable under the Code as a legal charge (see para 14).

D (2) The execution by the chargor was cogent evidence of his express antecedent agreement to provide security for the loan which the bank had given to the chargor. In view of the chargor's express antecedent agreement, the wrong attestation by an advocate and solicitor, instead of E by the land administrator, in relation to the Malay reserve land would not, in the absence of any fraud, misrepresentation or any other vitiating factor, invalidate the equitable third party charge (see para 15); *Mahadevan & Anor v Manilal & Sons (M) Sdn Bhd* [1984] 1 MLJ 266 (FC) followed; *United Malayan Banking Corporation Bhd v Syarikat* F *Perumahan Luas Sdn Bhd (No 2)* [1988] 3 MLJ 352 followed; *Ngan Khong v Bamah bt Pakeh Jamin & Anor* [1935] MLJ 167; [1935] FMSLR 81 referred; *Arunasalam Chetty v Teah Ah Poh Trading & Anor* [1937] MLJ 17 referred; *Vallipuran Sivaguru v Palaniappa Chetty* [1937] MLJ 59 referred; *Mercantile Bank v Official Assignee* [1969] 2 MLJ 196 referred; G *Chuah Eng Khong v Malayan Banking Bhd* [1999] 2 CLJ 917 referred.

(3) Although the chargor was already a bankrupt before he executed the charge, that did not ipso facto affect his capacity to execute the third party charge as he was at the material time still the registered proprietor of the H land which had not become registered in the name of the official assignee. Pursuant to s 349(3) of the Code, no land shall vest in the official assignee under any adjudication of bankruptcy, or order for administration in bankruptcy, until it has become registered in the name of the official assignee (see para 19); *Chua Tin Hong, Re: Ex Parte Castrol (M) Sdn Bhd* I [1997] 2 AMR 1253 (HC) referred; *Re: Kwan Chew Shen t/a Syarikat Kaaf (Official Assignee of The Property of Kwan Chew Shen, a Bankrupt)* [1987] 1 CLJ 314 (HC).

(4) Section 12 of the Malay Reservations Enactment (FMS Cap 142) also provided that no Malay reserve holding shall vest in the official assignee

on the bankruptcy of the proprietor thereof (see para 12); *Kapoor Singh v Haji Ibrahim bin Haji Mohamed Noor* [1948] MLJ 29 (HC) referred.

[Bahasa Malaysia summary

Perayu bank ('bank') menandatangani perjanjian pinjaman dengan peminjam pada 2 April 1992. Pinjaman tersebut mesti dijamin, antara lain, oleh caj pihak ketiga ke atas tanah rizab Melayu tertentu ('tanah tersebut') yang dimiliki oleh defendan. Caj tersebut dilaksanakan oleh defendan, sebagai penggadai, dan diakui oleh peguambela dan peguamcara dan bukan sebaliknya oleh pentadbir tanah. Selepas pelaksanaan dan perakuan, bank membayar pinjaman tersebut kepada peminjam. Bank, walau bagaimanapun tidak mempunyai pengetahuan bahawa defendan sebenarnya telah diputuskan bankrap pada 20 Februari 1991. Defendan kemudiannya memasukkan kaveat ke atas tanah tersebut pada 5 Mac 1993. Caj pihak ketiga ke atas tanah tersebut tidak dapat didaftarkan di pejabat tanah kerana caj diperakui oleh peguambela dan peguamcara. Bank oleh itu memohon kepada Mahkamah Tinggi untuk perintah-perintah, antara lain, mengisytiharkan kewujudan caj ekuiti ke atas tanah tersebut dan mengarahkan defendan untuk menarik balik kaveat dan untuk melaksanakan pendaftaran sah caj pihak ketiga ke atas tanah tersebut di hadapan pentadbir tanah. Walau bagaimanapun Mahkamah Tinggi menolak permohonan bank dan bank oleh itu merayu kepada Mahkamah Rayuan. Isu untuk penentuan Mahkamah Rayuan adalah sama ada caj pihak ketiga terhadap tanah rizab Melayu yang diperakui oleh peguambela dan peguamcara bukan sebaliknya oleh pentadbir tanah, boleh membentuk caj ekuiti pihak ketiga terhadap tanah yang sama untuk pendaftaran selanjutnya sebagai caj sah pihak ketiga, atas perakuan betul oleh pentadbir tanah.

Diputuskan, membenarkan rayuan tanpa perintah untuk kos:

(1) Caj yang dilaksanakan oleh defendan sebagai penggadai dan diperakui oleh peguambela dan peguamcara bukan pentadbir tanah jelas tidak mematuhi s 211 dibaca bersama perenggan 3(1) Jadual Kelima Kanun Tanah Negara ('Kanun'). Oleh itu, ia tidak didaftarkan di bawah Kanun sebagai caj sah (lihat perenggan 14).

(2) Pelaksanaan oleh penggadai adalah keterangan jelas mengenai perjanjian sebelum itu yang nyata untuk memperuntukkan sekuriti kepada pinjaman yang mana bank telah bayar kepada penggadai. Berdasarkan perjanjian penggadai sebelum itu yang nyata, perakuan salah oleh peguambela dan peguamcara bukan sebaliknya oleh pentadbir tanah, berkaitan tanah rizab Melayu tidak akan, di dalam ketiadaan apa-apa penipuan, salah nyata atau apa-apa faktor peringanan yang lain, mentaksahkan caj ekuiti pihak ketiga tersebut (lihat perenggan 15); *Mahadevan & Anor v Manilal & Sons (M) Sdn Bhd* [1984] 1 MLJ 266 (MP) diikut; *United Malayan Banking Corporation Bhd v Syarikat Perumahan Luas Sdn Bhd (No 2)* [1988] 3 MLJ 352 diikut; *Ngan Khong*

v Bamah bt Pakeh Jamin & Anor [1935] MLJ 167; [1935] FMSLR 81 dirujuk; *Arunasalam Chetty v Teah Ah Poh Trading & Anor* [1937] MLJ 17 dirujuk; *Vallipuran Sivaguru v Palaniappa Chetty* [1937] MLJ 59 dirujuk; *Mercantile Bank v Official Assignee* [1969] 2 MLJ 196 dirujuk; *Chuah Eng Khong v Malayan Banking Bhd* [1999] 2 CLJ 917 dirujuk.

(3) Walaupun penggadai telah menjadi bankrap sebelum dia melaksanakan caj tersebut, ia tidak ipso facto menjejaskan kapasitinya untuk melaksanakan caj pihak ketiga kerana dia pada masa material masih pemilik berdaftar tanah tersebut yang belum didaftarkan di atas nama pegawai pemegang harta. Berikutan s 349(3) Kanun, tiada tanah akan diletakhakkan di atas nama pegawai pemegang harta di bawah mana-mana penghakiman bankrap, atau perintah untuk pentadbiran dalam kebankrapan sehingga ia telah didaftarkan di atas nama pegawai pemegang harta (lihat perenggan 19); *Chua Tin Hong, Re: Ex Parte Castrol (M) Sdn Bhd* [1997] 2 AMR 1253 (MT) dirujuk; *Re: Kwan Chew Shen t/a Syarikat Kaaf (Official Assignee of The Property of Kwan Chew Shen, a Bankrupt)* [1987] 1 CLJ 314 (MT).

(4) Seksyen 12 Enakmen Rizab Melayu (FMS Cap 142) juga memperuntukkan bahawa tiada pemegangan rizab Melayu akan diletakhakkan di atas nama pegawai pemegang harta atas kebankrapan (lihat perenggan 12); *Kapoor Singh v Haji Ibrahim bin Haji Mohamed Noor* [1948] MLJ 29 (MT) dirujuk.]

Notes

For a case on whether bankrupt had capacity to charge land as security for loan, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) para 2353.

For cases on equitable charge, see 8(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 2305–2311.

For cases on Malay reservations in general, see 8(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 3348–3375.

Cases referred to

ARRM Arunasalam Chetty Son of Sithambaram Chetty v Teah Ah Poh trading under the style of Mun Seng Hin Kee; Teah Soo Chew trading under the style of Teah Chin Seng [1937] MLJ 17 (refd)

Chua Tin Hong, Re: Ex Parte Castrol (M) Sdn Bhd [1997] 2 AMR 1253, HC (refd)

Chuah Eng Khong v Malayan Banking Bhd [1998] 3 MLJ 97; [1999] 2 CLJ 917, FC (refd)

Kapoor Singh v Haji Ibrahim bin Haji Mohamed Noor [1948] MLJ 29, HC (refd)

Kwan Chew Shen t/a Syarikat Kaaf (Official Assignee of The Property of Kwan Chew Shen, a Bankrupt), Re: [1987] 1 CLJ 314, HC (refd)

Mahadevan & Anor v Manilal & Sons (M) Sdn Bhd [1984] 1 MLJ 266, FC (refd)

Mercantile Bank Ltd v The Official Assignee of the Property of How Han Teh [1969] 2 MLJ 196, HC (refd)

Ngan Khong v Bamah binti Pakeh Jamin Rasid bin Luha [1935] MLJ 167; [1935] FMSLR 81, HC (refd)

United Malayan Banking Corporation Bhd v Syarikat Perumahan Luas Sdn Bhd (No 2) [1988] 3 MLJ 352, HC (refd)

Vallipuram Sivaguru v PCRM Palaniappa Chetty Official Administrator as Administrator of the Estate of Gan Inn, deceased [1937] MLJ 59, CA (refd)

Legislation referred to

Malay Reservations Enactment (FMS Cap 142) s 12
National Land Code ss 211, 349(3), Fifth Schedule para 3(1)
Rules of the High Court 1980 O 92 r 4

Appeal from: Originating Summons No MT2–24–193 of 1998 (High Court, Shah Alam)

Veronica Dominic (Prasad Abraham & Associates) for the appellant.
Respondent not present.

Low Hop Bing JCA (delivering judgment of the court):

APPEAL

[1] This is an appeal by the plaintiff ('the bank') against the decision of the learned High Court judge who had on 8 January 2002 dismissed the bank's originating summons.

[2] In the originating summons, the bank sought, inter alia, the following orders:

(a) a declaration that there exists an equitable third party charge ('the equitable charge') over the land held under GM 475, Lot No 2116, Mukim Tanjong Dua Belas, Daerah Kuala Langat, Negeri Selangor ('the land');

(b) an order directing the defendant ('the chargor'):

(i) to execute a valid registrable third party charge over the land before the relevant land administrator in favour of the bank; and

(ii) to execute a withdrawal of a private caveat and to remove the private caveat lodged by the chargor on 5 March 1993.

(c) in the event the chargor fails to do the above, an order:

(i) directing the senior assistant registrar of the High Court to execute, on behalf of the chargor, all documents for the charge and the removal of the private caveat; and

(ii) giving liberty to the bank to present the duly executed documents for the charge and removal of the private caveat and for the land administrator to duly remove the private caveat and register the charge.

FACTUAL BACKGROUND

[3] On 2 April 1992, the bank entered into a loan agreement with one Abdullah Sani bin Ismail ('the borrower') to give a loan of RM1,000,000 ('the loan') to finance the borrower's purchase of shares.

[4] The loan was to be secured, inter alia, by way of a third party charge over the land. The charge was executed by the chargor as the owner thereof, and attested by an advocate and solicitor, instead of a land administrator. The land is Malay reserve land.

[5] The bank had, pursuant to the said execution and attestation, disbursed the loan which had been used for the borrower's purpose.

[6] Without the bank's actual or constructive notice, the chargor had been adjudicated a bankrupt on 20 February 1991.

[7] On 5 March 1993, the chargor lodged a private caveat on the land.

[8] The third party charge for Malay reserve land could not be registered at the relevant land office because the charge was attested by an advocate and solicitor.

[9] Subsequently, the bank's originating summons, seeking the aforesaid orders, was dismissed by the High Court.

[10] On 9 November 2009, we allowed the bank's appeal, set aside the decision of the High Court and granted an order in terms of the bank's originating summons. We now set out our grounds.

MALAY RESERVE LAND

[11] Learned counsel Ms Veronica Dominic submitted for the bank that the

learned High Court judge had erred in law in dismissing the bank's originating summons, as the intention of the parties, viz the chargor, the bank and the borrower, is clearly to create a third party charge as security for the loan. It was argued that, at the very least, there was an equitable third party charge in favour of the bank and that charge can in turn be properly attested by a land administrator for subsequent presentation and registration as a third party legal charge.

[12] The chargor was absent, and was not legally represented.

[13] Given the above factual background and submission, the question for our determination is:

> Where a third party charge relating to Malay Reserve land has been executed by the chargor, but attested by an advocate and solicitor instead of a land administrator, has a third party equitable charge been created thereby, for subsequent registration as a third party legal charge upon due and proper attestation by a land administrator?

[14] On the facts, we would immediately emphasise that the charge, executed by the chargor but attested by an advocate and solicitor instead of a land administrator, is clearly not in accordance with s 211 read with para 3(1) of the Fifth Schedule to the National Land Code. Hence it is not registrable thereunder as a legal charge.

[15] Be that as it may, the execution thereof by the chargor is cogent evidence of his express antecedent agreement to provide security for the loan which the bank had given to the borrower. In view of the chargor's express antecedent agreement, the wrong attestation by an advocate and solicitor, instead of a land administrator, in relation to the Malay reserve land would not, in the absence of any fraud, misrepresentation or any other vitiating factor, invalidate the charge. While it is true that the factual matrix could not have created any legal charge, 'our courts have resorted to equitable principles and consistently held that an agreement or an arrangement to secure a debt in favour of the creditor in respect of the debtor's land creates an equitable charge giving rise to an equitable right in favour of the creditor, although no charge or lien, within the provisions of the National Land Code or the previous Code is executed or created': per Salleh Abas CJ (Malaya) (later LP) in *Mahadevan & Anor v Manilal & Sons (M) Sdn Bhd* [1984] 1 MLJ 266 at p 270I rt (FC), citing *Ngan Khong v Bamah binti Pakeh Jamin Rasid bin Luha* [1935] MLJ 167; [1935] FMSLR 81; *ARRM Arunasalam Chetty Son of Sithambaram Chetty v Teah Ah Poh trading under the style of Mun Seng Hin Kee; Teah Soo Chew trading under the style of Teah Chin Seng* [1937] MLJ 17 at p 21; *Vallipuram Sivaguru v PCRM Palaniappa Chetty Official Administrator as Administrator of the Estate of Gan Inn, deceased* [1937] MLJ 59; and *Mercantile Bank Ltd v The Official Assignee of*

the Property of How Han Teh [1969] 2 MLJ 196. His Lordship asserted that there is 'no provision in the National Land Code prohibiting the creation of equitable charges and liens. The Code is silent as to the effect of securities which do not conform to the Code's charge or lien. Therefore equitable charges and liens are permissible under our land law': at p 271F left.

[16] *Mahadevan & Anor*, was followed, inter alia, in *Chuah Eng Khong v Malayan Banking Bhd* [1998] 3 MLJ 97; [1999] 2 CLJ 917 at p 929 g (CLJ) per Peh Swee Chin FCJ. In addition, we respectfully applied the maxim that equity deems that as done which ought to be done.

[17] Reverting to the facts in the instant appeal, as there was antecedent agreement between the bank and the chargor to have the land charged to the bank as security, the wrong attestation thereof would not ipso facto negate the creation of an equitable third party charge over the land in favour of the bank. We garner further support from *United Malayan Banking Corporation Bhd v Syarikat Perumahan Luas Sdn Bhd (No 2)* [1988] 3 MLJ 352 at p 357B left and C-D rt (HC), where Edgar Joseph Jr J (later FCJ) held, inter alia, that the charge therein was evidence of an antecedent agreement (either oral or written) to charge the land and such agreement is valid and enforceable. His Lordship also reiterated that the court has authority to decree specific performance of the agreement to charge the land by virtue of O 92 r 4 of the Rules of the High Court 1980 which is fortified by para 4 of the Schedule to the Courts of Judicature Act 1964 which confers on our High Courts the power, inter alia, to order land to be charged.

[18] Our answer to the above question is therefore in the affirmative.

BANKRUPT CHARGOR

[19] Although the chargor was already a bankrupt even before he executed the charge, that does not ipso facto affect his capacity to execute the third party charge, as he was at the material time still the registered proprietor of the land which had not become registered in the name of the official assignee. Section 349(3) of the National Land Code provides that no land shall vest in the official assignee under any adjudication of bankruptcy, or order for administration in bankruptcy, until it has become reigstered in the name of the official assignee pursuant to this section. See eg *Chua Tin Hong, Re: Ex Parte Castrol (M) Sdn Bhd* [1997] 2 AMR 1253 (HC); and *Re: Kwan Chew Shen t/a Syarikat Kaaf (Official Assignee of The Property of Kwan Chew Shen, a Bankrupt* [1987] 1 CLJ 314 at p 319 para 20 (HC).

[20] In addition, by virtue of the status of the land as Malay reserve land, no such holding shall vest in the official assignee on the bankruptcy of the proprietor thereof: s 12 of the Malay Reservations Enactment (FMS Cap 142), as further illustrated in *Kapoor Singh v Haji Ibrahim bin Haji Mohamed Noor* [1948] MLJ 29 (HC), per Murray-Aynsley CJ.

CONCLUSION

[21] In the circumstances, we held that the learned High Court judge has erred in dismissing the bank's originating summons. We allowed this appeal, set aside the order of the court below and substituted it with an order in terms of the originating summons as enumerated in para 2 above. However, we made no order as to costs. Deposit to be refunded to the bank (the appellant).

Appeal allowed with no order as to costs.

Reported by Andrew Christopher Simon